No. 92-469

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

CHARLES LOAGUE,

Petitioner

VERSUS

SUPER SAGLESS CORPORATION

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Should a jury be instructed on the *McDonnell-Douglas v. Green*, 411 U. S. 792 (1973), method of proving discrimination in an age discrimination case?

2. When an older, qualified employee is discharged and replaced by a much younger employee, should the jury be instructed that it may infer age discrimination?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is non-published. However, the opinion is an application of *Walther v. Lone Star Gas Co.*, which is published at 952 F. 2d 119 (5th Cir. 1992). The opinion in this case is included as an appendix to this Petition.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals entered June 15, 1992 by Writ of Certiorari under 28 USC 1254.

FEDERAL STATUTE INVOLVED

The federal statute involved is 29 USC 623(a), which says:

> It shall be unlawful for an employer...to discharge an individual...because of such individual's age.

STATEMENT OF THE CASE

Petitioner, Charles League, filed suit in the United States District Court for the Northern District of Mississippi claiming age discrimination in his discharge. The case was tried twice. The first trial resulted in a jury verdict for League. Record (R), 326-328. However, the District Judge granted a judgment notwithstanding the verdict for the Respondent, Super Sagless Corporation. R., 346-356. On appeal, the United States Court of Appeals for the Fifth Circuit reversed the judgment notwithstanding the verdict, but permitted a second trial. R., 340.

At the second trial, like the first one, League produced no direct evidence of age discrimination. Rather, relying on *McDonnell-Douglas Corp. v. Green*, 411 U. S. 792 (1973), he presented a purely circumstantial evidence case. He proved that he was qualified for his position since he had been employed by the company for over 26 years, with over 20 years of this spent as a supervisor. He proved that he was discharged. He proved that he was 56 years old and was replaced by a 23 year old with no experience. Transcript (T), 26, 29.

The employer countered with proof that League was replaced by the 23 year old because of poor performance. T., 101-239. Consistent with the *McDonnell-Douglas* model, League responded with evidence of pretext by demonstrating that the legitimate reasons given by the Defendant were, in fact, false. T., 243-306.

Since League had no direct evidence of age discrimination, he requested a jury instruction modeled on *McDonnell-Douglas Corp. v. Green, supra*. Specifically, League requested the following jury instruction:

> The Court instructs the jury that the law does not require a discrimination case to be proved by direct evidence. Such a case may be proved by circumstantial evidence. To prove a case of age discrimination by circumstantial evidence, it is necessary that the Plaintiff, Charles League,

prove the following factors:

1. That he is over 40 years of age;

2. That he was qualified for his position;

3. That even though qualified, he was discharged from his position;

4. That he was replaced by a substantially younger person.

Proof of the above four factors raises a presumption of age discrimination. To overcome this presumption of age discrimination, the Defendant is required to articulate or give legitimate, non-discriminatory reasons for the discharge. In this case, I charge you that Super Sagless has given or articulated non-discriminatory reasons for discharging Plaintiff....

(If) the reasons given by the Defendant, Super Sagless Corporation...were the real reasons for Plaintiff's discharge, then it is your duty to return a verdict in favor of Super Sagless Corporation.

On the other hand, if you find, from a preponderance of the evidence, that the reasons given by Super Sagless Corporation were not its real reasons for discharge, and were a mere pretext for discriminating against Loague, then you may find that Loague's discharge was the result of age discrimination and you may return a verdict in favor of the Plaintiff, Charles Loague.

R., 367-368.

The District Court refused the instruction. The District Court held that *McDonnell-Douglas Corp. v. Green* applies only in non-jury cases, and that juries must not be instructed on the *McDonnell-Douglas* presumption. R., 342-346. The United States Court of Appeals for the Fifth Circuit affirmed. While the First Circuit held in

Loeb v. Textron, Inc., 600 F. 2d 1003 (1st Cir. 1979), that a jury should be instructed on the *McDonnell-Douglas* model, the Fifth Circuit held that, under *Walther v. Lone Star Gas Co.*, 952 F. 2d 119 (5th Cir. 1992), juries are not to be instructed on the *McDonnell-Douglas* model.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RECONCILE THE CONFLICT IN THE CIRCUITS AS TO WHETHER A JURY SHOULD BE INSTRUCTED ON THE *MCDONNELL-DOUGLAS* MODEL FOR PROVING DISCRIMINATION IN A CIRCUMSTANTIAL EVIDENCE CASE.

Recognizing that employers are unlikely to admit that employment actions are discriminatory, *McDonnell-Douglas v. Green*, 411 U. S. 792 (1983) held that a Plaintiff need not adduce direct proof of discrimination in order to prevail in an action under Title VII of the Civil Rights Act of 1964. Rather, *McDonnell-Douglas* held:

> The Complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing:
>
> (i) that he belongs to a racial minority;
>
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
>
> (iii) that, despite his qualifications, he was rejected;
>
> (iv) that after his rejection, the position remained open and the employer continued to seek applicants for persons of complainant's qualifications....
>
> The burden must then shift to the employer to articulate some legitimate, non-discriminatory reason for Respondent's rejection....

> (Once such reasons have been articulated employee) must be afforded a fair opportunity to show that (employer's) stated reasons for rejection was, in fact, pretextual....

The Circuits are divided as to whether, in a jury trial, under the Age Discrimination in Employment Act, the jury should be instructed on this *McDonnell-Douglas* model of proof. In *Walther v. Lone Star Gas Co.*, the Fifth Circuit stated that a *McDonnell-Douglas* type instruction should not be given to the jury. In the present case, the Fifth Circuit followed *Walther*, holding:

> We recently discussed this issue in *Walther v. Lone Star Gas Co.*, 952 F. 2d 119 (5th Cir. 1992). In that age discrimination case, the Court had instructed the jury on the elements of a prima facie case, and the Defendant challenged the instruction on appeal. We observed that "it was inappropriate for the District Court to submit the issue of prima facie case to the jury"...
>
> We...considered it confusing and unnecessary for the court to instruct the jury on shifting burdens and presumptions....

The Fifth Circuit's rule that a jury should not be given *McDonnell-Douglas* guidance in considering an age discrimination case is contrary to the First Circuit's decision in *Loeb v. Textron, Inc.*, 600 F. 2d 1003 at 1017-18 (1st Cir. 1979), which held:

> Whether the jury is also instructed that the Plaintiff must establish the four elements of the *McDonnell-Douglas* type prima facie case...and that the employer's reason is a pretext will depend on whether the Plaintiff's age discrimination claim is provable in classic *McDonnell-Douglas* terms. If the principal ingredients of the Plaintiff's case are inferences that are to be derived from the underpinnings of the *McDonnell-Douglas* type case, the jury should be asked to make these findings. That is, elements fashioned from those in the *McDonnell-Douglas* prima facie case should be defined in the charge and the jury should be told that in order to prevail, Plaintiff must prove each element and also that Defendant's stated reasons

> for the discharge was a pretext. The jury should be told that if it finds all of the disputed elements, and the Defendant's reasons as a pretext, it would be warranted in finding for the Plaintiff on the ultimate issue of age discrimination.

600 F. 2d at 1017-18.

Cases which follow the First Circuit's rule that a *McDonnell-Douglas* type instruction should be given in a purely circumstantial evidence case include *Dehues v. Western Elect. Co., Inc.*, 710 F. 2d 1344, 1347 (8th Cir. 1983); *Perry v. Kunz*, 878 F. 2d 1056 (8th Cir. 1989); *Stanojev v. Ebasco Services, Inc.*, 643 F. 2d 914 (2nd Cir. 1981); *Golomb v. Prudential Ins. Co. of America*, 688 F. 2d 547 (7th Cir. 1982); *Blackwell v. Sun Elect. Corp., 696 F. 2d 1176 (6th Cir. 1973); and Kitchen V. Chippewa Valley Schools*, 825 F. 2d 1004 (6th Cir. 1987).

On the other hand, the Fourth Circuit follows the Fifth Circuit's rule that no *McDonnell-Douglas* instruction should be given. *Nelson v. Greenford, Inc.*, 788 F. 2d 205 (4th Cir. 1986).

Besides the fact that there is a conflict in the circuits, the Writ should also be granted because of the unsoundness of the Fifth Circuit rule. Absent an instruction that a jury may infer age discrimination from replacement of a 56 year worker with an inexperienced 23 year old, a jury has no basis upon which to find age discrimination. Absent such an instruction, it may think that direct evidence is required; whereas, the law is clearly settled that Plaintiff is not required to adduce direct evidence of discrimination. *McDonnell-Douglas, supra.*

Furthermore, the Writ should be granted because the Fifth Circuit rule is inconsistent with *Patterson v. McLean Credit Union*, 491 U. S. 164 (1989). *Patterson* involved a jury trial under 42 USC 1981, and it characterized the prima facie method of *McDonnell-Douglas* as being a "sensible, orderly way to evaluate the evidence..." If the *McDonnell-Douglas* formulation is a method of "evaluating the evidence", surely the jury must be told about it so it can "evaluate the evidence".

Another reason why it is so important that this Court hear this case is the recent enactment of the Civil Rights Act of 1991. The Courts of Appeals have not previously interpreted Title VII of the Civil Rights Act of 1964 to provide for trial by jury. See cases cited in *Hubbard v. Environmental Protection Agency*, 949 F. 2d 453 (D. C. Cir. 1991). Thus, the issue of jury instructions under the Civil Rights Act of 1964 has not previously arisen. However, with the right to jury trial now provided by §102 of the Civil Rights Act of 1991, all District Courts are now confronted with the question of how to instruct juries in Title VII cases. The issue will be a pervasive one in the district court, and this court should make an early determination of the issue so as to avoid the countless appeals that will undoubtedly be forthcoming if this Court does not inform the district courts on the correct method of instructing juries in employment discrimination cases. This Court should grant the Writ in order to instruct district courts on proper jury instructions in all employment discrimination cases, whether arising under the Civil Rights Act of 1991, or the Civil Rights Act of 1964, or the Age Discrimination in Employment Act.

Respectfully submitted,

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NO.

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SUPER SAGLESS CORPORATION,

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APPENDIX

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In The

United States Court Of Appeals For The Fifth Circuit

No. 91-7310

Summary Calendar

CHARLES LOAGUE,

Plaintiff-Appellant,

v.

SUPER SAGLESS CORPORATION

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Mississippi
(CA EC89-85-S-D)

Before KING, EMILO M. GARZA, and DeMOSS, Circuit Judges.
PER CURIAM:*

Charles Loague, a 56 year old employee of Super Sagless Corporation (SSC), was terminated in 1988 and replaced with a younger worker. He sued under the Age Discrimination in Employment Act, 29 USC 623, and won a jury verdict. The District Judge granted SSC's Motion for Judgment Notwithstanding the Verdict and condi-

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

tionally granted a motion for a new trial. On appeal, we reversed the j.n.o.v., but affirmed the grant of a new trial. *Loague v. Super Sagless Corp.*, No. 90-7014 (5th Cir. 1991) (unpublished). A second trial resulted in a jury verdict for SSC. Loague again appealed.

Loague's sole point on appeal is that the District Court erred in refusing to instruct the jury that, once he established the four elements of a prima facie age discrimination case,[1] an inference of discrimination arose which it was SSC's burden to rebut with evidence of a non-discriminatory motive. He contends that, absent this instruction, the jury was never told how discrimination could be proved. We recently discussed this issue in *Walther v. Lone Star Gas Co.*, 952 F. 2d 119 (5th Cir. 1992). In that age discrimination case, the Court had instructed the jury on the elements of a prima facie case and the Defendant challenged the instruction on appeal. We observe that "it was inappropriate for the District Court to present the issue of prima facie case to the jury." Once the Defendant has produced evidence of a non-discriminatory motive for discharge and the Plaintiff has (as in the instant case) come forward with evidence that the asserted motive is actually a pretext for discrimination. "the trier of fact should proceed directly to the ultimate issue of whether the Defendant intentionally discriminated against Plaintiff." Id. (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U. S. 711, 715-16 (1983). We went on to state: "Under the logic of *Aikens*, it is clear that the issue of whether a Plaintiff made out a prima facie case has no place in the jury room." In fact, we also considered it confusing and unnecessary for the Court to instruct the jury of shifting burdens of presumption. However, the erroneous instruction was not grounds for reversal in *Walther* where the Defendant failed to object at trial and the instruction did not constitute plain error. In his reply brief, Loague argues that *Walther's* statements about the propriety of jury instructions on the prima facie case are dicta and that the case is not

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[1]The elements are set forth in *Bienkowski v. American Airlines, Inc.*, 851 F. 2d 1503 (5th Cir. 1988). Loague had to show that (1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class (between the ages of 40 and 70) at the time of his discharge; (4) he was replaced by someone outside the protected class; or (5) by someone younger; or (6) otherwise show that his discharge was because of age. Id. at 1504-05.

applicable here because the district court in *Walther* actually gave the instruction. *Walther* may, indeed, be dicta, but it is a perfectly accurate statement of the law. In *Aikens*, the Supreme Court held that the discrimination analysis of *McDonnell-Douglas Corp. v. Green*, 411 U. S. 792 (1973)[2] applies only in the directed verdict or summary judgment context, not at trial. Accordingly, the Court need not instruct the jury on the shifting burdens established by *McDonnell-Douglas*, but need only instruct that the ultimate burden of proving discrimination remains with the Plaintiff at all times. *Powell v. Rockwell Int'l Corp.*, 788 F. 2d 279 (5th Cir. 1986); See also *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248 (1981). In this case, League clearly satisfied the prima facie case, SSC introduced evidence that his termination derived from a non-discriminatory motive, and League countered with circumstantial evidence tending to show that the asserted motive was pretextual. The Court's instructions accurately informed the jury that League had the burden of proving discrimination.[3]

SSC has requested that we award it damages and double costs because League's appeal is frivolous. See Fed.R.App.P. 38. In addition, SSC points out League did not cite *Walther* in his original brief despite the fact that it was decided shortly after the notice of appeal was filed. We take the drastic steps of awarding sanctions under Rule 38, "When the claim advanced is unreasonable, or it is not brought with a reasonable good faith belief that it is justified." *Stelly v. Commissioner*, 761 F. 2d 1113, 1116 (5th Cir.), cert. denied, 474 U. S. 851 (1985). We recently found sanctions appropriate when appellants, *inter* alia, argued positions directly contrary to existing

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[2]The *McDonnell-Douglas* analysis applies in the age discrimination context.

[3]League also relies on *Haring v. CPC Int'l, Inc.*, 664 F. 2d 1234 (5th Cir. 1981), a case that approved of jury instructions on a prima facie case. *Walther* makes clear, however, that *Haring's* treatment of the prima facie case as a factual matter for jury resolution is to be considered dictum in light of the Supreme Court's later decision in *Aikens*. *Walther*, 951 F. 2d at 127. League urges us to disregard *Walther's* overruling of *Haring*, citing the familiar rule that one panel of this Court may not overrule the decision of another panel. However, an intervening decision of the Supreme Court which changes or clarifies the law permits us to depart from earlier, inconsistent precedent. *Ketchum v. Gulf Oil Corp.*, 798 F. 2d 159 (5th Cir. 1986).

law without addressing or urging a change in the law. *Pillsbury Co. v. Midland Enterprises, Inc.*, 904 F. 2d 317, 318 (5th Cir.), cert. denied 111 S. Ct. 515 (1990).

The troubling aspect of League's conduct in this appeal is his utter failure to raise or address binding circuit precedent until forced by SSC to respond in his reply brief. League's opening brief gives the impression that the question is totally open in this Circuit, whether the jury should be instructed on the prima facie discrimination case. Indeed, in his statement regarding oral argument, League asserts that "This Court has never passed upon the issue of whether a jury should be told of the *McDonnell-Douglas* rules." In fact, this Circuit decided this very issue in *Powell*, a 1986 decision, and revisited it (in somewhat different form) in January, 1992, one month after the notice of appeal was filed and more than one and one-half months before League filed his opening brief. League failed to cite *Walther, Powell or Aikens*, the latter a Supreme Court case that directly addresses the propriety of using the *McDonnell Douglas* burden-shifting analysis at trial.

Although the law in this area is clearly contrary to League's basic position, an opening brief in which League in good faith acknowledged the cases and argued for a modification of the law might make the damages issue closer. League evaded existing law, however, and framed his appeal as presenting an issue of first impression in the circuit. We cannot sanction such tactics. Double costs of the appeal are assessed against League.

AFFIRMED.

DOUBLE COSTS ASSESSED.

(2)

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Super Sagless Corporation,[1] submits this Brief opposing the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

In his Statement of the Case, Petitioner misstates the District Court's rationale for refusing the requested jury instruction. The District Court did not hold that *McDonnell Douglas Corp. v. Green* applies only in non-jury cases. (Petition at 3.) Instead, in refusing the requested instruction, the District Court stated:

> THE COURT: You see why the jury doesn't decide this *prima facie* business, Counsel. It's really just a vehicle used in the case like this where discrimination is rarely admitted or an open type thing that you can prove by direct evidence. The case lay (sic) says that indeed it is rather difficult to prove. And so by giving these four factors, which if proven, it simply shifts the burden of production over. I don't want to confuse this jury with the burden of production shifting to one party and what have you. So, I don't know. I'm not going to give all this.

(T. 339.) Subsequently during the charge conference, the District Judge noted:

> THE COURT: ...and the truth is, the *prima facie* case, has been made and they have articulated the legitimate, non-

[1] Pursuant to Rule 29.1, Respondent states that Mohasco Corporation is its parent. Citicorp is the parent of MHS Holdings Corporation, which is the parent of Mohasco Corporation.

discriminatory reason.

MR. JAQUA: (Respondent's Counsel) Your Honor, that's my objection to it, is that the case would not even [be] before them if we didn't have the *prima facie* case.

THE COURT: That's right.

(T. 341.)

Thus, the trial judge did apply the *McDonnell Douglas v. Green* analysis in this jury case in deciding that a *prima facie* case had been established, that the Defendant had articulated a legitimate, non-discriminatory reason for the discharge, and that, therefore, there was a question of fact (motivation) that was submissible to the jury. Recognizing that "the jury doesn't decide this *prima facie* business," the judge decided not "to confuse this jury with the burden of production shifting to one party and what have you." (T. 339.)

The jury was charged that: they were to "carefully and impartially consider all the evidence in the case" (T. 359), "you must consider all the evidence" (T. 361); the Plaintiff has the burden of proving by a preponderance of the evidence "that age was a determinative factor in Defendant's decision to terminate Plaintiff's employment" (T. 363); "if age was a determinative factor in the decision to terminate the Plaintiff, then the Defendant is liable to the Plaintiff even though other factors might also have contributed to the decision" (T. 363-64); "[i]ntent to discriminate means actual motive" (T. 364); and "Mr. Loague must convince you by a preponderance of the evidence that the reasons given by Super Sagless are only a cover-up for intentional age discrimination against him." (T. 365.)

On appeal, the Fifth Circuit decided that "[t]he Court's instructions accurately informed the jury that Loague had the burden of proving discrimination." (Petitioner's Appendix at 11.) The Court of Appeals also agreed with the District Judge's rationale in rejecting the proposed *McDonnell Douglas* instruction:

> Once the Defendant has produced evidence of a non-discriminatory motive for discharge and the Plaintiff has (as in the instant case) come forward with evidence that the asserted motive is actually a pretext for discrimination, "the trier of fact should proceed directly to the ultimate question of whether the Defendant intentionally discriminated against Plaintiff." [Citing *Walther v. Lone Star Gas Co.*, 952 F.2d 119 (5th Cir. 1992) (quoting *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-16 (1983)]. ... In fact, we also considered it confusing and unnecessary for the Court to instruct the jury of shifting burdens of presumption.

(Petitioner's Appendix at 10.)

SUMMARY OF THE ARGUMENT

In an ADEA case, where a *prima facie* case has been established under the *McDonnell Douglas Corp. v. Green* formulation and the employer has articulated legitimate, non-discriminatory reasons for its actions, the jury is presented the ultimate fact issue of the employer's real motive in the challenged action. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983). There is no need for the jury to be instructed as to the *prima facie* elements at this stage, and several courts of appeals have recognized that such instructions could be

confusing. In the instant case, the Court of Appeals found that the jury was adequately instructed as to the ultimate issue to be decided, namely, whether age was a determinative factor in the employer's decision. *Aikens* strongly supports, if not compels, that conclusion. There is no conflict in the circuits calling for the Court's reconciling guidance, especially in light of *Aikens*. Petitioner has mischaracterized and distorted the appellate decisions cited in the Petition.

ARGUMENT

1. The Court's Precedents Subsequent To *McDonnell Douglas Corp. v. Green* Strongly Support, If Not Compel, The Fifth Circuit's Decision Affirming Refusal Of The Requested *Prima Facie* Instruction.

In this case, the Fifth Circuit cited and relied on *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). However, Petitioner does not even mention those cases, much less address their holdings and rationales.[2]

In *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 714, 715 (1983), the Court held that when the defendant fails to persuade the District Court to dismiss the action for lack of a *prima facie* case, and responds to the plaintiff's proof by offering evidence of its reasons for the challenged actions, "the fact finder must then decide whether the [challenged action] was discriminatory." At this stage, "the *McDonnell-Burdine*

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[2] A similar evasion of existing law occurred below, where the Court of Appeals noted the "troubling aspect of Loague's conduct in this appeal is his utter failure to raise or address binding circuit precedent until forced by [Respondent] to respond in his reply brief." (Petitioner's Appendix at 12.) Double costs of appeal were assessed as a sanction. *(Id.)*

presumption 'drops from the case,' [450 U.S. at 255 n.10], and 'the factural inquiry proceeds to a new level of specificity.' *Id.* at 255." *Aikens,* 460 U.S. at 715. The Court explained that where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, it is no longer relevant whether the plaintiff really did so. The trier of fact "should have proceeded to the specific question directly, just as district courts decide disputed questions of fact in other civil litigation." *Id.* at 715, 716.

In *Aikens,* the Court expressly recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult, but concluded that this does not mean that trial courts should treat discrimination differently from other ultimate questions of fact. "Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the allocation of burdens and order of presentation of proof,' . . . in deciding this ultimate question." *Id.* at 716 (internal citation omitted.)

Under *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), the significance of the establishment of a *prima facie* case is that the employer is then required to articulate (but not prove) a legitimate, nondiscriminatory reason or explanation for its action. Once the defendant has met its burden of production, the presumption of discrimination under *McDonnell Douglas Corp. v. Green* simply "drops from the case." *Burdine,* 450 U.S. at 255, n.10. The plaintiff's burden of showing that the defendant's reason is pretextual "merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." *Id.* at 256.

It has long been recognized that in a disparate treat-

ment case "[p]roof of discriminatory motive is critical." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977). As the judge charged the jury in the instant case, intent to discriminate means "actual motive," and is a question of fact. *Pullman-Standard v. Swint,* 456 U.S. 273, 285-89 (1982). "[I]t is not a legal presumption to be drawn from the factual showing of something less than actual motive." *Id.* at 290.

Consistent with *Burdine* and *Aikens,* the District Judge in the instant case correctly noted that the *McDonnell Douglas* formulation is simply a "vehicle" for the trial court's use in discrimination cases. This tool is also utilized in jury cases, but by the judge, not the jury. The jury decides the question of fact as to actual discrimination; as in other civil litigation, the judge decides whether such a triable issue of fact exists.

The jury in the instant case was presented the ultimate issue and was instructed to consider all of the evidence. Petitioner had the opportunity to attempt to persuade the jury that his replacement by a younger individual demonstrated that he was the victim of intentional age discrimination and that the Respondent's explanation was only a pretext or cover-up for discrimination. Indeed, Petitioner challenges only the denial of his requested instruction, but forwards no objections to the admission of evidence, the conduct of the trial, or to the correctness of the remainder of the trial court's jury instructions.[3]

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[3] Petitioner also seems to contend that the judge was required to comment to the jury concerning Petitioner's showing that he was replaced by a much younger individual. However, Petitioner requested no special limited instruction in this regard. Although trial judges have certain *discretion* to comment on evidence, they are rarely, if ever, *required* to do so.

2. There Is No Conflict In The Circuits Calling For The Court's Reconciling Guidance.

Petitioner's argument that the Fifth Circuit's decision is in conflict with those of the First Circuit and other circuits grossly mischaracterizes the cited decisions and ignores the significant fact that the First Circuit's decision in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) was decided prior to both *Burdine* and *Aikens*. See Petition at 5-6.[4]

Even though *Loeb v. Textron* was decided prior to *Burdine* and *Aikens*, the First Circuit noted there the significant danger that reading a *McDonnell Douglas* formulation to a jury might "add little to the jurors' understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination." 600 F.2d at 1006. Subsequently, *Aikens* decided that the trier of fact should proceed directly to the ultimate question of motivation once the defendant has responded to a *prima facie* case. After *Aikens*, there is no enduring rationale for the *Loeb* court's statement that the jury should be asked to make findings as to the *prima facie* elements. Moreover, in the instant case, there was no triable issue that Petitioner had been replaced by a much younger individual — that fact was admitted by Respondent. Hence, there was no need (and no request for) a special

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[4]Petitioner also argues that the Fifth Circuit decision is inconsistent with *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Even a cursory review of Patterson reveals that the decision in that case has no relevance. At most, the Court noted that *McDonnell Douglas* presented a "sensible, orderly way to evaluate the evidence" in the course of deciding that a case tried under 42 U.S.C. §1981 should be treated similar to one under Title VII. The instant case does not present the issue of whether *McDonnell Douglas* is to be applied in an ADEA action — the courts below assumed that *McDonnell Douglas* was a proper framework for the judge to follow in deciding whether to submit the case to the jury.

instruction or interrogatory on this element.

Most disturbing is that Petitioner mischaracterizes decisions from the Second, Sixth, Seventh, and Eighth Circuits as following the "rule" of *Loeb v. Textron*, allegedly contrary to the Fifth and Fourth Circuits. A review of the cited decisions, however, reveals that none of them stand for the cited proposition, and several are either *directly contrary* to the proposition or do not address the issue at all.

Stanojev v. Ebasco Services, Inc., 643 F.2d 914 (2d Cir. 1981), is a pre-*Aikens* case which does not even address the issue here. Moreover, Petitioner does not mention the Second Circuit's subsequent decision in *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 85-86 (2d Cir. 1983), a post-*Aikens* decision in which the Second Circuit specifically rejected a similar argument that a jury should have been instructed on the elements of a *prima facie* case. As here, the judge had properly instructed the jurors that they must find that age is a "determinative factor" and that age need not be the only contributing factor. *Id.* at 80, 86.

Petitioner similarly misstates the holdings of the Sixth Circuit. Although *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983) was decided a few months before *Aikens*, the *Blackwell* court specifically held that "it was not error for the court to refuse to instruct the jury on the *prima facie* elements of a discrimination case as set forth in *McDonnell Douglas.*" *Id.* at 1179, 1180. The court also noted that in weighing the adequacy of jury instructions, they must be taken as a whole. *Id.* at 1181. As in the instant case, the trial judge's instructions adequately informed the jury of the issue that they were to decide. *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987) cited and relied on *Aikens* (825 F.2d at 1012), in concluding that a failure to follow *McDonnell Douglas* and

Burdine in jury instructions was not in error. *Id.* at 1012. Petitioner does not cite more recent Sixth Circuit decisions reaffirming that circuit's view that *McDonnell Douglas/Burdine* jury instructions are *not* required and, moreover, would add little to jurors' understanding. *See Booker v. Brown*, 879 F.2d 1304, 1311 (6th Cir. 1989); *Lewis v. Sears*, 845 F.2d 624 (1988).

Golomb v. Prudential Insurance Company of America, 688 F.2d 547 (7th Cir. 1982), cited by Petitioner, was also decided prior to *Aikens*. While a jury instruction in that case included elements of a *prima facie* case, there was no challenge on appeal in that respect. The plaintiff challenged the judge's failure to explain the meaning of "pretext." The judge had referred to it as "cover-up." The judge had also instructed the jury that they were to determine whether age was a "determinative factor." The Seventh Circuit held that it was not reversible error to fail to explain in greater detail the meaning of "pretext," and that the jury instructions as a whole were adequate.

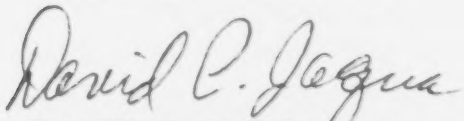
Petitioner also cites *Perry v. Kunz*, 878 F.2d 1056 (8th Cir. 1989), although Perry did not deal with jury instructions at all. The court simply overturned a grant of summary judgment, noting that the plaintiff was not limited to proving her case through the *McDonnell Douglas* formulation. In *Dehues v. Western Electric Co.*, 710 F.2d 1344 (8th Cir. 1983), the *plaintiff* objected to the use of the four elements of a *prima facie* case in the jury instructions. The court merely concluded that there was no reversible error, because the elements of a *prima facie* case were actually *disputed* and one of the parties insisted that proof of each element was essential to the case. 710 F.2d at 1347. In the instant case, there was no such dispute as to the *prima facie* elements.

In short, Petitioner has disingenuously posited an irreconcilable conflict between the circuits based on mischaracterizations of cited cases, where in fact there is scarcely a suggestion of tension between the courts of appeals on this issue. Certainly, in light of *Aikens*, there is not a sharp conflict calling for the Court's reconciling guidance.

CONCLUSION

The Petition for A Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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I hereby certify that 40 copies of the Opposition brief in the above entitled and numbered cause have been filed with the Clerk, U.S. Supreme Court and copies have been served upon the following parties:

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Thomas Taylor
NOTARY

October 14, 92
DATE

THOMAS J. TAYLOR
NOTARY PUBLIC, PARISH OF ORLEANS, LA.
MY COMMISSION IS ISSUED FOR LIFE